PERWIRA HABIB BANK (M) BHD.

v.

LUM CHOON REALTY SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CODE NO. C2-23-4260-86]
30 MARCH 1992

CIVIL PROCEDURE: *Setting aside judgment in default - Irregular judgment - Judgment obtained for sum in excess of amount recoverable under terms of guarantee.*

The plaintiff obtained judgment in default of defence against the second defendant as guarantor of an overdraft facility given to the first defendant for a sum of RM14,149,979.35. The second defendant applied to set aside the judgment on grounds of irregularity, citing the terms of the letter of guarantee and the judgment sum.

Held:

[1] The preamble to the first letter of guarantee under which the second defendant's liability arose clearly limited the total amount recoverable against the second defendant to a sum not exceeding RM10,000,000, exclusive of interest and charges.

[2] The amount stated in the judgment sum is far in excess and the defendant had a right *ex debito justitiae* to set aside the judgment.

[Application allowed with costs. Judgment in default set aside.]

For the plaintiffs - Mazlinda bt. Mokhzan; M/s. Ng Yook Woon, Andrew T.C. Saw & Co.
For the 2nd defendant - Ghazi Ishak ; M/s. Presgrave & Matthews
For the 1st, 3rd & 4th defendants - Harjit Singh; M/s. Harjit Singh Sangay & Co.

JUDGMENT

Zakaria Yatim J:

This was an application by the second defendant to set aside the judgment in default of defence obtained by the plaintiff against all the defendants on 19 March 1987.

The relevant part of the judgment in default is reproduced below:

> No defence having been filed by the defendants' solicitors ... IT IS THIS DAY ADJUDGED that the defendants do pay the Plaintiff the following sums:
>
> (a) ...
>
> (b) RM14,149,979.35 as against the 2nd and 3rd Defendants as guarantors under the First Letter of Guarantee as at the 26 day of November 1986 together with interest thereon at the rate of 16.5% per annum on monthly rests basis from 27th day of November 1986 to date of judgment and thereafter at the rate of 8% per annum until date of full payment ...

Encik Ghazi, Counsel for the second defendant submitted that the judgment in default obtained by the plaintiff was an irregular judgment on the ground that the judgment sum entered against the second defendant was in excess of the amount the plaintiff was entitled to.

In support of his submission he referred to para. 5 of the statement of claim which states:

> 5. By a letter of guarantee in writing dated 1 July 1982 executed by the 2nd and 3rd defendants (hereinafter referred to as "the first letter of guarantee") the 2nd and 3rd defendants for the consideration therein set out, guaranteed payment to the plaintiff on demand of all monies due and remaining unpaid by the 1st defendant to the plaintiff in respect of the overdraft facility together with interest thereon until date of full settlement. The plaintiff will rely on the first letter of guarantee for its full terms and effect.

He also referred to para. 9 of the statement of claim. Paragraph 9 states:

> 9. The plaintiff's claim against the 2nd and 3rd defendants as guarantors under the first letter of guarantee is for the sum of RM14,149,979.35 being the outstanding balance of the overdraft facility as at 26 November 1986 together with interest thereon at the rate of 6% above the plaintiff's base lending rate currently at 10.5% on monthly rests basis from 27 November 1986 till date of full payment.

It is clear from the two paragraphs above, the second defendant was sued by the plaintiff in respect of the first letter of guarantee dated 1 July 1982. The amount claimed against the second defendant was RM14,149,979.35 together with interest.

Encik Ghazi next referred to the interest rate in the judgment which was 16.5% per annum on monthly rests. According to him in the plaintiff's letter of offer dated 10 June 1982 which was addressed to the first defendant, the interest rate was 15.5% per annum.

Puan Mazlinda, Counsel for the plaintiff contended that the judgment obtained by the plaintiff was a regular judgment. She said that the amount of RM14,149,979.35 as stated in the judgment in default consisted of the principal sum and interest.

After hearing the submissions of both Counsel and after considering the evidence in this case I was satisfied that the amount stated in the judgment in default was far in excess of the amount the plaintiff was entitled to claim against the second defendant.

In the letter of guarantee dated 1 July 1982, the liability of the second defendant was only RM10,000,000 exclusive of interest and charges. This is explicit in the preamble of the said letter of guarantee which states as follows:

> In consideration of your making or continuing advances or otherwise giving or continuing credit or banking facilities (including the issue of guarantee by you) to M/S LUM CHOON REALTY SDN. BHD., hereinafter called the Principal, I/we jointly and severally guarantee to you due repayment, within two days after demand, of all moneys which shall at any time be due to you from the Principal, in any shape or form, together with interest, charges, commission, costs etc. provided that the total amount recoverable from me/us jointly and severally under this guarantee shall not any time exceed the principal sum of RM10,000,000 (Ringgit: Ten Million Only) exclusive of interest and charges.

Since the plaintiff had entered judgment far in excess of the amount the second defendant was liable to pay under the letter of guarantee, the second defendant had a right *ex debito justitiae* to have the judgment set aside.

I accordingly set aside the judgment in default entered into against the second defendant 19 March 1987 with costs.

Also found at [1992] 4 CLJ 2027